GEORGE PATHMANATHAN A

v.

PORTCULLIS INTERNATIONAL LTD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
HASNAH MOHAMMED HASHIM JC
[SUIT NO: D3-26-50-2006]
3 OCTOBER 2011

COMPANY LAW: *Oppression - Oppression of minority - Minority shareholder/director ('petitioner') in management control of company and subsidiaries - Petitioner unilaterally and arbitrarily removed from management of company after fall-out with majority shareholder/director - Whether majority shareholders behaved oppressively and in disregard of petitioner's rights and interests - Companies Act 1965, s. 181(1)(a)* C D

The petitioner and the second respondent ('Chong') were directors of the third respondent company ('the company') which owned several subsidiary companies (collectively 'the Group'). The petitioner held a 25% shareholding in the company and the subsidiaries. The remaining 75% was held by Chong. Both of them agreed the petitioner was to manage the business of the Group. Chong never involved himself in the group's management apart from being occasionally consulted. The petitioner exercised the day-to-day management control and executive power of the Group and supervised all aspects of the group's business development. Under his stewardship, the companies in the Group began to prosper. However, following a disagreement with Chong over the shareholding in the company, Chong and the first respondent took unilateral and arbitrary steps to totally exclude the petitioner from the management and affairs of the company and its subsidiaries. The petitioner alleged Chong had not only unlawfully compelled him to sell his shares in the company to the first respondent but also transferred out funds belonging to the company and one of its subsidiaries to foreign companies owned by Chong which were not part of the Group. The petitioner alleged Chong, by himself and/or through his servants, agents and/or nominees, conducted the affairs of the company and its subsidiaries in such a way as to destroy, diminish and/or irreversibly prejudice their respective businesses and, consequently, the petitioner's interests in them as well. Their actions, he said, were E F G H I

oppressive, unfairly prejudicial to and in disregard of his interests as a member of the company. He petitioned the Court under s. 181(1)(a) of the Companies Act 1965 for, *inter alia,* various declaratory orders, injunctions to prevent Chong from unilaterally transferring out funds belonging to companies in the group, a refund of all unauthorised or improper advances made by the respondents and an account of the financial affairs of the company and its subsidiaries from the date he was ex-communicated from the affairs of the company and/or group.

Held (granting the prayers in the petition with RM100,000 costs):

(1) The conduct of the first and second respondents in purported exercise of powers of the company for a collateral purpose was oppressive and unfairly prejudicial to, and in disregard of, the petitioner's interests. (para 88)

(2) Based on the oral and documentary evidence, the petitioner had been excluded from the day-to-day management of the company which he had managed since its inception. No notice was given to the petitioner. (para 82)

(3) The petitioner's version was acceptable as being the reasonable, credible and probable version on the ground it was cogently supported by documentary evidence. The evidence adduced for the respondents was self-destructive and clearly contradicted their own contemporaneous documents. (para 88)

Case(s) referred to:

Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors [1998] 3 CLJ (Supp) 126 HC ***(refd)***

Foss v. Harbottle [1843] 2 Have 461 ***(refd)***

Genisys Intergrated Engineers Pte Ltd v. UEM Genisys Sdn Bhd & Other [2008] MLJU 418 ***(refd)***

Harben v. Phillips [1883] 23 Ch D 14 ***(refd)***

Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & 13 Ors [1993] 1 LNS 32 HC ***(refd)***

Koh Jui Hiong & Ors v. Ki Tak Sang & Ors [2009] 10 CLJ 205 HC ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & 50 Ors And Another Application [1994] 1 LNS 73 HC ***(refd)***

Lord v. Copper Mines Co [1848] 2 Ph 740 ***(refd)***

Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721 FC ***(refd)***

Re Dernacourt Investment Pty Ltd; Baker Davis Supply Co Pty Ltd & Ors Dernacourt Investments Pty Ltd & Ors v. Dernacourt Investments Pty Ltd & Ors [1990] 2 ACSR 553 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***

Wholesale Society Ltd v. Meyer [1959] AC 324 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181(1)(a)

Labuan Companies Act 1990, s. 152

Labuan Financal Services And Scurities Act 2010, s. 184

For the petitioner/respondent - Kumar Kanagasingam (Gaithri Anbalagan with him); M/s Lee Hishamuddin Allen & Gledhill

For the respondents/appellants - Nad Segaram; M/s Shearn Delamore & Co

Reported by Ashok Kumar

JUDGMENT

Hasnah Mohammed Hashim JC:

[1] The petitioners' cause of action alleges oppression and/or disregard by the majority shareholders of the minority shareholders' interest under s. 181(1)(a) of the Companies Act 1965 and sought the following relief;

(i) that the 1st respondent and/or the 2nd respondent is in breach of the shareholders' agreement for the petitioner to manage the company and its subsidiaries;

(ii) that the respondents and/or any one of the them acting jointly and/or separately are conducting the affairs of the company and its subsidiaries, and/or are exercising the powers as directors of the company and its subsidiaries, in a manner that is oppressive and/or in disregard of the petitioner's interest as a member of the company;

(iii) that the respondents have procured and/or caused to be done, acts which unfairly discriminates against or is otherwise prejudicial to the petitioner as a member of the company;

(iv) that the removal of the petitioner from the management of the company and its subsidiaries is unlawful;

(v) that the act of the 2nd respondent in instructing Foo Chee Thong, to transfer USD500,000 from the accounts of Portcullis TrustNet (Labuan) Limited ("PTnet(L)L") in Maybank International (L) Ltd and HSBC Bank Malaysia Berhad, Labuan branch to International Trustee Holding Company Limited ("ITHCL") account in DBS Bank Ltd Singapore is unlawful;

(vi) that the act of the 2nd respondent in causing surplus funds available in PTnet(L)L, that is totalling USD$797,855, and available for distribution by way of dividends through PTnet(L)L and the company were transferred to companies outside Malaysian jurisdiction and controlled by the 2nd respondent, such as ITHCL, Portcullis Trustnet (Singapore) Pte Ltd, Portcullis Fund Services (S) Pte Ltd and Portcullis (China) Ltd., without obtaining the approval and consent of the board of directors of PTnet(L)L and/or the petitioner is unlawful; and

(vii) that the 2nd respondent had wrongfully caused the following sums to be transferred or withdrawn from PTnet(L)L to ITHCL:

(a) USD$420,000 to be transferred from PTnet(L)L to ITHCL; and

(b) USD$241,742.68, being debts collected by ITHCL for PTnet(L)L from PTnet(L)L's clients, to be retained by ITHCL.

[2] The following injunctions:

(i) an injunction restraining the 2nd respondent whether by himself, agent and/or servants from carrying out or giving effect to the transfer of USD$500,000 from the accounts of PTnet(L)L in Maybank International (L) Ltd and HSBC Bank Malaysia Berhad, Labuan branch to ITHCL's account in DBS Bank Ltd in Singapore and in the event that the transfer had been effected, for an order that the 2nd respondent do return the said sum or any part thereof to PTnet(L)L within seven days from the date of this order;

(ii) an injunction restraining the 2nd respondent whether by himself, agent and/or servants from carrying out or giving effect to the transfers of any of the group's funds to any other party without prior consent from the petitioner as director and member of the company;

for an order that the 1st respondent do sell to the petitioner all the 1st respondent's shares in the company at the net book value or at any other price to be determined within 30 days from the date of the order;

for an order that the 2nd respondent and the company do hereby cause all assets, monies and/or properties which have been transferred or withdrawn from the company and the Subsidiaries to any third party, including but not limited to all monies transferred or withdrawn from PTnet(L)L to ITHCL as stated in paras. 5.4.15 and 5.4.16 to be forthwith refunded to the company and the subsidiaries;

an order that the respondents or any one of them are forthwith restrained from effecting and/or carrying out any transaction and/or arrangements in any manner howsoever for the purpose of and/or relating to the transfer and/or withdrawal of any assets, monies and/or properties which the company and the subsidiaries have beneficial and/or legal interest to any third party;

an order that all arrangements, agreements and/or contracts entered into and all resolutions passed in connection with and/or for the purpose of effecting the transfer and/or withdrawal of any assets, monies and/or properties which the company and the subsidiaries have beneficial and/or legal interest to any third party, including but not limited to all monies transferred or withdrawn from PTnet(L)L to ITHCL as stated in paras. 5.4.10 and 5.4.11, to be forthwith set aside and shall have no effect in any manner howsoever;

alternatively, for the following orders:

(i) that the petitioner continues to manage the company in accordance with the shareholders' agreement; and

(ii) that interim dividends be declared for PTnet(L)L and the company for the financial years 30 April 2006 to 30 April 2009;

an order that the 1st and 2nd respondents shall:

(i) refund all unauthorized and/or improper advances and all other payments the 1st and 2nd respondents received with effect from 7 July 2006 till the date of judgment to the company;

(ii) indemnify the company and the subsidiaries, including but not limited to PTnet(L)L, for all claims, fines, loss, damage, liabilities, penalties, contingent or otherwise, relating to the company and the subsidiaries;

(iii) give a full account and disclosure of the financial transactions by the company from 7 July 2006 till the date of judgment;

(iv) give a full account and disclosure of the profits made by the company and the subsidiaries from 7 July 2006 till the date of judgment;

(v) give a full account of the monies paid out of the company and the subsidiaries without resolution of the board of directors of the company and the subsidiaries;

[3] That the 2nd respondent is hereby ordered to pay damages for breach of his fiduciary duty owed to the company and/or the petitioner and that such damages be assessed;

[4] Damages, interest, cost and any other or further relief.

Background

[5] The petitioner is a registered shareholder of Portcullis Holdings (Malaysia) Sdn. Bhd. (hereinafter referred to as "3rd respondent"), and holds 25% of the issued shares in the company. The 3rd respondent is a private limited company limited by shares and incorporated in Malaysia under the Companies Act 1965 on 27 October 1994. The registered office address of the company is at Lot 308, 3rd Floor Wisma MPL, Jalan Raja Chulan, 50200 Kuala Lumpur.

[6] The authorized share capital of the 3rd respondent is RM100,000 divided into 100,000 ordinary shares of RM1 each of which 100 shares have been issued. The primary object for which the company was established is to carry on business as an investment holding company.

[7] The affairs of the 3rd respondent are regulated by, the provisions of the Companies Act, the Articles of Association of the Company, Memorandum of Agreement (Malaysia) and express and/or implied agreement either by conduct or oral between the petitioner and the 1st and 2nd respondents as the only shareholders of the company at various times.

[8] The directors of the company are: A

(i) Chong Kok Kong (the 2nd respondent); and

(ii) George Pathmanathan (the petitioner).

[9] In 1991, the petitioner established a law firm in Labuan by B the name of Messrs Johnson & George. The principal areas of practice of the firm was offshore banking, mergers and acquisitions, offshore investment banking coupled with onshore banking, conveyancing and litigation.

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[10] The 2nd respondent was practicing in Singapore under the name of Messrs David Chong & Co (Singapore) as the principal partner. The 2nd respondent then set up a law firm in Malaysia, also known as Messrs David Chong & Co (Malaysia) (DCM) with some Malaysian lawyers as salaried partners. DCM operated in D Kuala Lumpur and Johor Bahru. However, the 2nd respondent was based exclusively in Singapore and only visited the Malaysian offices occasionally.

[11] Apart from his legal practice, the 2nd respondent also E operated two other companies, one known as Portcullis Nominees Sdn. Bhd. (PNSB) which provided nominee services and Portcullis Services Sdn Bhd (PSSB) which provided company secretarial services. PNSB and PSSB were then not active.

[12] By agreement between the 2nd respondent and the F petitioner, the petitioner's law firm was dissolved and the petitioner joined DCM as a partner. DCM then established a branch office in the Federal Territory of Labuan, using the premises and assets of the petitioner's law firm. The petitioner was the partner solely in charge of the Labuan branch. The 2nd respondent then sought G the assistance of the petitioner to develop the businesses of PNSB and PSSB. The petitioner did provided the assistance sought. By the end of 1993, PNSB and PSSB had five companies as their clients.

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[13] In mid-1994, the petitioner proposed to the 2nd respondent that the parties set up a trust company in Labuan to provide, *inter alia*, a complete range of offshore corporate and trust services to offshore clients ("the Trust Business"). PSSB was then used as the vehicle to conduct the proposed Trust Business. PSSB was I then renamed "Portcullis Trust Sdn Bhd" ("PTSB") on 12 May 1994. It was agreed between the 2nd respondent and the petitioner that the latter will hold 25% shareholdings in PTSB with the remainder being held by the 2nd respondent.

[14] The petitioner was based in Labuan and familiar with the business and social environment in Labuan and thus recruited key personnel such as Mr Foo Chee Thong as general manager. As the office of PTSB had to be based in Labuan, the petitioner secured office premises which were located next door to the law office of the Labuan Branch of DCM. On 17 July 1995, PTSB obtained a licence to operate the Trust Business in Labuan issued by the Registrar of Offshore Companies under the Labuan Trust Companies Act, 1990 and immediately thereafter commenced the Trust Business.

[15] On 4 July 1997, PTSB's name was changed to Portcullis Trust (Labuan) Sdn Bhd (PT(L)SB). Sometime in 1997, the 2nd respondent and the petitioner decided to restructure PT(L)SB and PNSB as well as to formalize the equity shareholdings of the parties. Towards this end, a new holding company, namely the company, was established to hold all the shares in PT(L)SB and PNSB. Thus all of the parties' respective shares in PT(L)SB and PNSB were transferred to the company in consideration of which the parties received their respective shares in the company. As part of the restructuring, a new company, Portcullis (Malaysia) Sdn Bhd ("PMSB") was incorporated on 4 August 1997 as a wholly-owned subsidiary of the company. PMSB then changed its name to Portcullis TrustNet (Malaysia) Sdn Bhd ("PTnet (M) SB").

[16] On 8 April 2003, the company incorporated an offshore company called Portcullis Trust (Labuan) Limited as a wholly-owned subsidiary which underwent a name change to "Portcullis TrustNet (Labuan) Limited" ("PTnet (L)L"). PT(L)SB underwent a restructuring in 2004 into a public company called Portcullis Trust (Malaysia) Berhad ("PTMB").

[17] The petitioner has a 25% shareholding in the company and an indirect 25% stake in all of the company's wholly-owned subsidiaries, namely PNSB, PTnet (M) SB, PTMB and PTnet(L)L (collectively, "the subsidiaries").

[18] Consistent with the petitioner's role as the partner in charge of the Labuan branch of Messrs David Chong & Co (Malaysia), it was agreed between the 2nd respondent and the petitioner that the petitioner is to manage the business of the company and its subsidiaries ("the group") including the Trust Business.

[19] The petitioner managed and developed the business of the group particularly the trust business. The 2nd respondent was never involved in the management and his role was limited to the occasional consultation and business development prospects. The petitioner made all day-to-day management decisions. Where strategic issues were involved, although there was no prior agreement that both parties would jointly decide on the issues, the petitioner would consult the 2nd respondent and even then the 2nd respondent invariably left to the petitioner to make the decisions.

[20] Instances of the day-to-day management by the petitioner included the following:

(i) employment of staff of the group;

(ii) determining and review of salaries and bonuses of staff in the group (except for years 2004 and 2005 when, at the petitioner's request, the 2nd respondent made the decision);

(iii) approving leave of staff and granting staff loans, all manner of claims;

(iv) all staff reporting to the petitioner, including but not limited to the company secretary for the company, Christine Lum, and PTnet(L)L's general manager, Foo Chee Thong;

(v) capital expenditure of the Group for instance purchase of computers, photocopier, telephone and all other office equipment;

(vi) day-to-day running of the business of the group including business development, dealing with specific legal aspects of the group's client requirements, liaising with all the authorities namely Bank Negara Malaysia, Inland Revenue Department and LOFSA regarding products and services of the group; and

(vii) attending almost all the scheduled meetings with LOFSA since 1996.

[21] Since 1995 the Group had accumulated a total of 364 offshore companies, partnerships and trusts as clients which as at May 2006, 227 of these offshore entities remain as clients of the group. The annual turnover of the Trust Business rose from RM127,601 in 1995 to US$1,038,431 (RM3,790,276) as at 30 April 2006.

[22] The business of the company has been carried out on the following basis:

(i) the petitioner retained all day-to-day management control and executive power of the group; and

(ii) the 2nd respondent functioned purely as one of the directors in the group.

[23] The 2nd respondent introduced some clients to the Group via Portcullis Trustnet (Singapore) Pte Ltd. Although the 2nd respondent was obligated to develop the Trust Business as a director of the company, on the occasions that he was in a position to do so, he nevertheless took personal advantage of the situation. This is because the 2nd respondent required as a condition for his introduction that 50% of all the fees, to be earned from these clients, including recurring fees earned annually, be paid to his company in Singapore. Of the remaining 50% of the fees, the 2nd respondent also benefited from his 75% shareholdings in the company.

Acts Of Oppression

[24] Three grounds of complaints were put forward by the petitioner as constituting oppression. The petitioner contended that all powers of management vested in the board of directors of a company are of a fiduciary nature. Therefore the powers of management of the board must be exercised *bona fide* in the interests of the company as a whole, not sectional so as to achieve proper and not collateral purposes.

[25] Quite apart from the fiduciary duties imposed on the board of directors of the company at common law and in equity, the petitioner further contended that pursuant to s. 181 of the Companies Act 1965, the affairs of the company must not be conducted or threatened to be conducted in a manner which is oppressive, in disregard of the interests of, unfairly discriminates or unfairly prejudicial to, one or more members of the company.

[26] It is the contention of the petitioner that in respect of all the conduct complained of, the 1st and 2nd respondents have exercised powers not *bona fide* in the interests of the company as a whole as the powers were exercised to serve personal or sectional interests.

[27] The petitioner further contended that the following acts and/ or omission of the 1st and 2nd respondents since December 2005 show that the 1st and 2nd respondents have:

(a) breached the agreement of the parties; and

(b) disregarded the petitioner's rights as a director and shareholder of the company.

Locked Out

[28] Around late 2004, the 2nd respondent acquired TrustNet Ltd, a trust company with offices in six offshore financial centers in British Virgin Islands, Cook Islands, Hong Kong, Mauritius, Samoa, Singapore and Seychelles (hereinafter referred to as 'the Overseas Companies').

[29] The 1st and 2nd respondents disregarded the petitioner's interest as a member of the company and had decided and proceeded unilaterally with the integration of the group with the overseas companies. The 2nd respondent reorganized the management structure and policy-making decision processes binding the group with the overseas companies, even though the petitioner has no beneficial or legal interest in the overseas companies. Under the process, the petitioner was excluded entirely from all day to day management and the decision-making process of the group. Thus the staff of the group will no longer report to the petitioner but to a person by the name of Kim Boo who operates from Singapore.

[30] The petitioner said he was never consulted nor was his consent sought to this new management structure and policy-decision processes. This is clearly in breach of the agreement and is also a violation of the petitioner's right as a director and a shareholder of the company.

[31] In December 2005, the 2nd respondent issued a group organization chart where the petitioner was unilaterally removed from the management of the group. In this context:

(i) No board meeting or paper meeting was carried out to the effect;

(ii) The petitioner was not even informed; and

(iii) The Petitioner only became aware of this in January 2006.

[32] In April 2006, one Geoff Barry who is neither a staff nor a director of any of the companies in the group, and acting purportedly as the Group Finance Director, issued a "Travel and Other Expenses Claim Policy" by which the petitioner's existing authority in respect of such matters was abruptly removed. Here we have a situation where a director of the company in the person of the petitioner is stripped of his authority by someone who is not even a staff or a director of the company or any companies in the group.

[33] On 7 July 2006, the 2nd respondent instructed the staff of the company and the subsidiaries in particular Foo Chee Thong and Christine Lum, to cease all communications with the petitioner which caused the petitioner to have no access to the premises, documents and all information pertaining to the operation and management of the company and the subsidiaries.

Compelling Sale Of Shares

[34] The 2nd respondent had unfairly and unlawfully compelled the petitioner to sell his shares in the company to the 1st respondent.

Arbitration Proceedings

[35] The 1st respondent brought arbitration proceedings against the petitioner when the petitioner declined to comply with the demands made *via* the letter dated 4 April 2006.

[36] On 19 February 2009, pursuant to the arbitration proceedings, it was held, *inter alia*, that the petitioner was a shareholder in the company and the 1st respondent was not entitled to demand for the shares to be sold to it. It was further held that the petitioner was not required to resign as a director of the company and the subsidiaries.

[37] The 1st respondent did not appeal against the decision of the arbitrators, despite initial indications by the 1st respondent that the 1st respondent intended to appeal against the decision of the arbitrators.

[38] Notwithstanding the findings of the arbitrators, the respondents refused the petitioner from having access to information relating to the company and its subsidiaries. The staff of the company and the subsidiaries also did not have any communication with the petitioner.

Unlawful Transfer Of Funds

[39] The petitioner discovered there was an attempt by the 2nd respondent to unlawfully withdraw the sum of USD500,000 (RM1,825.000) from PTnet (L)L ("Withdrawn Sum"):

(i) The 2nd respondent issued an instruction, as a director of a company named International Trustee Holding Company Limited ("ITHCL") under the letterhead of ITHCL dated 10 May 2006, to PTnet(L) directing Mr Foo Chee Thong to transfer the Withdrawn Sum immediately to an account held under ITHCL in DBS Bank Ltd in Singapore. The basis of the instruction appears to be that there are surplus funds which are not required for current requirements of PTnet(L)L.

(ii) The petitioner made the discovery in the course of instructing Mr Foo to prepare the requisite Board Resolution of PTnet(L)L, to declare an interim dividends for the Financial Year Ending 30 April 2006 as there was surplus funds in PTnet(L)L. Mr Foo then informed the petitioner of the instruction he had received referred to in para. 5.4.12 above which when carried out will erase all surplus funds in PTnet(L)L.

(iii) ITHCL is not part of the group and there is absolutely no legal basis for the 2nd respondent in his capacity as a director of ITHCL to issue the aforesaid instruction. ITHCL is a company incorporated in the British Virgin Islands and controlled by the 2nd respondent and thus will be beyond the jurisdiction of this Honourable Court. To make matters worse, the 2nd respondent issued the aforesaid instruction without any prior consultation with or agreement of the petitioner even though it involved funds of the group. The petitioner will never agree to the transfer of funds to a company unrelated to the group and into an account outside of Malaysia. Such a transfer will give the 2nd respondent complete control of the funds, as a director of an unrelated company.

(iv) The only reason Mr Foo did not act on the instruction immediately was because the funds were placed in fixed deposits which would mature on 12 June 2006. The petitioner verily believes the instruction will be carried out on the maturity date. To this end, Mr Foo had instructed the bank concerned to uplift the fixed deposit on 12 May 2006.

[40] The 2nd respondent had also withheld his agreement to declare dividends for PTnet(L)L and ultimately the company as the holding company even though PTnet(L)L had a very profitable year and had, to quote the 2nd respondent "surplus funds".

[41] The petitioner further states that since the presentation of this petition, the 2nd respondent has caused the Withdrawn Sum or part thereof to be transferred from PTnet(L)L and the said sum has to date not been refunded to PTnet(L)L.

[42] Since the petitioner was locked out of the affairs of the company and the subsidiaries, the 2nd respondent caused surplus funds available for distribution by way of dividends from the company and PTnet(L)L to be transferred to companies outside the Malaysian jurisdiction owned by the 2nd respondent, such as ITHCL, Portcullis Trustnet (Singapore) Pte Ltd, Portcullis Fund Services (S) Pte Ltd and Portcullis (China) Ltd, totalling USD797,855 as at 30 April 2009, without the consent of the petitioner.

[43] In particular, pursuant to an examination carried out by Labuan Offshore Financial Services Authority Malaysia ("LOFSA") in March 2009, it has been confirmed that the 2nd respondent caused:

(a) USD$420,000 to be transferred from PTnet(L)L, being a subsidiary of the company, to ITHCL; and

(b) USD$241,742.68, being debts collected by ITHCL for PTnet(L)L from PTnet(L)L's clients, to be retained by ITHCL.

[44] This was all done without obtaining the proper disclosure and approval of the board of directors for PTnet(L)L and without the consent of the petitioner.

[45] The petitioner states that the transactions set out above were not evidenced in any form of written agreement approved by the board of directors of PTnet(L)L or the petitioner. The petitioner further states that any agreement documenting the transactions were in any event not based on terms and conditions that are favourable to the company and PTnet(L)L.

[46] The 2nd respondent has by himself and/or through his servants, agents and/or nominees at all material times conducted the affairs of the company and PTnet(L)L in such a way so as to

destroy, diminish and/or irreversibly prejudice the business of the company and PTnet(L)L and hence, the interest of the petitioner in the company.

[47] For the reasons mentioned above the petitioner states that:

(i) the 1st respondent is in breach of the shareholders' agreement for the petitioner to manage the company and its subsidiaries; and/or

(ii) the affairs of the company and/or its subsidiaries are being conducted in a manner oppressive to the petitioner or in disregard of the petitioner's interests as a member of the company; and/or

(iii) various acts of the 1st and 2nd respondents have been done which unfairly discriminates against or is otherwise prejudicial to the petitioner as a member of the company.

[48] By reason of the matters stated above, the conduct of the 1st and 2nd respondents in a purported exercise of powers of the company for a collateral purpose are consequently oppressive, unfairly prejudiced and in disregard of the interests of the petitioner.

The Law

[49] Section 181 of the Companies Act 1965 provides as follows:

> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
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> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

A (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may:

B (a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

C (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

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(e) provide that the company be wound up.

[50] The leading authority on s. 181 is *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227 where at pp. 228-229 of the report Lord Wilberforce on behalf of the Privy Council laid down the following historical background and guidelines with regards to s. 181:

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F ... This section can trace its descent from s. 210 of the United Kingdom Companies Act 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider s. 186 of the Australian Companies Act 1961. But s. 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (1)(a) it adds disregard of the interests of members, etc. to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see *In Re HR Harmer Ltd* [1959] 1 WLR 62, at p. 75). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section 2, which sets out the kinds of relief which may be granted, it provides for "remedying the matters complained of" and states as a specific type of relief that of winding-up of the company.

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I (ii) Section 210 is differently constructed. Under it, the Court is required to find that the facts would justify the making of a winding-up order under the 'just and equitable' provision in the

Act, but also that to wind-up the company would unfairly prejudice the 'oppressed' minority. The Malaysian section, on the other hand, requires (under sub-section 1(a)) a finding of 'oppression' or 'disregard', and then leaves to the Court a wide discretion as to the relief which it may grant, including among the options, that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of s. 210, but is not the case under s. 181.

(iii) Their Lordships consider it important that Courts applying s. 181 should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions, which are based upon a different section, and in some cases restrictive. The same applies, though with less force, to reliance upon Australian decisions upon s. 186.

(iv) There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part. Relief cannot be sought under s. 181 merely because facts are established which would found a minority shareholders' action: the section requires (relevantly) 'oppression' or 'disregard' to be shown, and these are not necessary elements in the action referred to. But if a case of 'oppression' or 'disregard' is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action. To the extent that the appellants so contend their Lordships do not accept their argument.

(v) Secondly, for the case to be brought within s. 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interest in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be evoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v. Elder & Watson Ltd* [1952]

SC 49: their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale* [1925] SC 311, at p. 315). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

(vi) Thirdly, in a number of United Kingdom decisions it has been held that for s. 210 to apply the complainant must show oppression continuing up to the date of proceedings (e.g. *In Re Jermyn Street Turkish Baths Ltd.* [1971] 1 WLR 1042); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the section (and the same is true of s. 181(1)(a) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of s. 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-section (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002, at pp. 1011-2.

(vii) Their Lordships have made these observations upon the Malaysian s. 181, not because they disagree with the statement of the law by the Federal Court - which indeed recognised the wider scope of s. 181 as compared with the corresponding provisions in England and in Australia. They are concerned rather to emphasise the utility of the jurisdiction conferred upon the Courts in Malaysia, and to deal with particular arguments urged in this case with some of which they do not agree.

[51] The scope of s. 181 of the Act was discussed more recently in *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd. & Anor* [2010] 6 CLJ 721, where the Federal Court held as follows:

> ..., in order to succeed in its petition pursuant to s.181 the petitioner has to establish and 'must eminently be determined according to the facts' of this case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interests, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.

[52] The Federal Court went further to explain what is 'unfairness' in the context of s. 181:

> It may also be noted that from the wordings of s. 181 its basic theme is 'unfairness'. However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. "The court ... has a very wide discretion, but it does not sit under a palm tree"'. (See: *O'Neil v. Philips* [1999] 2 All ER 961).

[53] Siti Norma J (later CJM) in *Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & 13 Ors* [1993] 1 LNS 32 High Court gave a broader definition of oppression:

> ... oppression does not necessarily mean illegal or fraudulent nor does it require fraud. For there to be oppression, there must be a visible departure from the standard of fair dealing or fair play and where the oppressed is constrained to submit to some overbearing act or attitude on the part of the oppressor ...

[54] In *Wholesale Society Ltd v. Meyer* [1959] AC 324 Viscount Simonds observed:

> When a subsidiary company formed with an independent minority of shareholders, the parent company is under an obligation so to conduct its own affairs as to deal fairly with its subsidiary.

[55] In the course of his speech, Viscount Simonds described the conduct of the directors of the holding company in caustic terms. He said that the holding company had 'doomed the company to destruction' and 'was ruthless and unscrupulous in design'.

[56] Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; mentioned that oppression is 'a visible departure from the standards of fair dealing and a violation of the

conditions of fair play which a shareholder was entitled to expect' is a matter that depends on the peculiar facts and circumstances of each case ..."

[57] In *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & 50 Ors And Another Application* [1994] 1 LNS 73; [1994] 2 MLJ 789 Anuar J (as he then was) at pp. 804-806 cited *Re Tivoli Freeholds Ltd*: where Menhennitt J said:

> ... Whether or not a company is being conducted in a manner oppressive to certain shareholders depends upon all the circumstances and it is not possible to attempt a universal definition. However, in the kind of situation which arises in this case and having regard to the matters relied upon by the petitioner and the supporting members, the following elements are I think included in the matters postulated in the section and are also established by the authorities:
>
> (1) Those alleging that the affairs of the company have been conducted in a manner oppressive to them must establish, as one element, conduct which the Court of Appeal has recently restated in the case of *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at p 1059, as conduct which is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Cooperative Wholesale Society Ltd v. Meyer* [1959] AC 324 at p. 342, 'burdensome, harsh and wrongful' to the other members of the company or some of them and lacks that degree or probity which they are entitled to expect in the conduct of the company's affairs: see *Scottish Co-operative Wholesale Society Ltd v. Meyer and Re HR Harmer Ltd* [1959] 1 WLR 62.
>
> It is to be noted that Buckley LJ, delivering the judgment of the court, appears to have stated lack of probity of the kind described as an element additional to the requirement that the conduct must be unfair or burdensome, harsh and wrongful. In *Scottish Co-operative Wholesale Society Ltd v. Meyer*, Lord Keith at p 364, stated the test as 'lack of probity and fair dealing', using the word 'and'. However, in Lord Keith's judgment in *Elder v. Elder and Watson Ltd* 1952 SC 49 at p 60, adopted by Jenkins LJ in the case of *Re Harmer Ltd* at p 78, Lord Keith said: 'oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary right as a shareholder'. There it is put in the alternative. In the light of these statements, I deal with this petition on the basis that there may be cases in which either lack of probity or unfairness may be sufficient in itself to make conduct oppressive to a member.

In the unreported decision of Lush J in M Dalley & Co Pty Ltd (30 April 1968) his Honour stated, at p 43: 'In my opinion want of probity is only one of the ways in which oppression can manifest itself, as indeed the use of the alternative 'lack of probity or fair dealing' by Lord Keith indicates. One person may 'subject another to continual injustice' by insisting, however honestly, on a proposition that is wrong or by using his strength to maintain, however honestly, a position unjustified in law.' Later in his judgment as part of his finding that there had been oppression in that case his Honour said at p. 45, that 'the respondents were fixed in their determination to classify the petitioner's shares as employee shares and so to remove her from the company at relatively small cost and to their own and their children's advantage'.

He later said that the respondents' stand was 'dictated by the self interest of the directors and obdurately maintained' (at p. 46). Although the High Court reversed the decision of Lush J on another point ([1968] 43 ALJR 19), the order made by the High Court, at p. 24, was an order for the purchase of the shares of minority shareholders, which can be made only under s. 186 of the Companies Act 1961 and not on the just and equitable ground alone under s. 222(1)(h). For this reason, it appears to me that the High Court's order in *Dalley*'s case affirms the conclusion that there was oppression in that case. Accordingly, I proceed on the basis that persistent illegal conduct towards a shareholder may be sufficient to constitute oppression of him if it is dictated by self-interest.

(2) The oppression must be of the members as such, that is in their capacity as shareholders. It was so decided in *Re HR Harmer Ltd* [1959] 1 WLR 62 at 75, in respect of the English equivalent provision, namely, s 210, and the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p. 1012, held that this consideration applies to s 186(1) of the Victorian Companies Act: see also per Lord Keith in the passage cited above from *Elder v. Elder and Watson Ltd* 1952 SC 49.

(3) It appears to follow from the last-mentioned concept and the reference in the section to the affairs of the company being conducted in a manner oppressive to members that there must be something adverse, or detrimental to the members' financial interests as shareholders. In all the reported cases of which I am aware, where oppression has been found, this has been the fact and it was this aspect to which I

understand Jacob J, referred when he said in *Re Broadcasting Station 2GB Pty Ltd* [1964-5] NSWR 1648 at p. 1662, that, the word oppressive involves, among other things, that 'some member or members have suffered in a pecuniary sense in their capacity of members (*Scottish Co-operative Wholesale Society v. Meyer*) that is to say, their rights as members have been affected'.

(4) The affairs of the company must be being conducted in a manner oppressive to some member or members when the petition is presented. This is involved in the expression 'are being conducted': see *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at p 1059.

(5) Oppression may occur even although all the members of a company are treated equally: see, for example, Meyer's case. The unfairness may arise, for example, by reason of an advantage to a parent company.

(6) So far as the alleged oppressors are concerned, it must also be established it seems to me that oppression results from 'some overbearing act or attitude on the part of the oppressor': *Re Jermyn Street Turkish Baths Ltd* at pp 1042 and 1060. In delivering the judgment of the Court of Appeal, Buckley LJ, having defined aspects of oppression applicable to that case, then said at p. 1060: 'We do not say that this is so far as the alleged oppressors are concerned, it must also be necessarily a comprehensive definition of the meaning of the word 'oppressive' in s. 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for the present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor.

Having stated that what had earlier been said was not necessarily a comprehensive definition, his Lordship appears to me to have then stated what is a universal element in the sentence beginning 'Oppression must, we think, import'. Again, whilst not stating it as a universal test, the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1011, applied the test that 'conduct would be oppressive within the meaning of s. 186 if directors or shareholders holding a controlling power in the direction of the company's affairs were to pursue a course of conduct designed by them

to advance their own interests or the interests of others of their choice to the detriment of the company or the detriment of other shareholders'. The concept of 'some overbearing act or attitude' appears to me to be involved in Viscount Simond's expression 'burdensome, harsh and wrongful'. To determine whether conduct is unfair it is necessary to examine it from the point of view of both the alleged oppressed and the alleged oppressor. In *Re M Dalley & Co Pty Ltd*, in making his findings of oppression, Luah J relied upon his findings that the respondents had sought to remove the petitioner from the company at a relatively small cost and had been dictated by self-interest.

(7) It is a corollary of the element referred to in (6) above that 'it was not intended by s. 186 or s. 94 to give jurisdiction to the court (a jurisdiction the courts have always been loath to assume) to interfere with the internal management of a company by directors, who in the exercise of the powers conferred upon them by the memorandum and Articles of Association are acting honestly and without any purpose of advancing the interest of themselves or others of their choice at the expense of the company or contrary to the interest of other shareholders' (per the Full Court in *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 at p 1011).

Buckley J, as he then was, referred to the same aspect in *Re Five Minute Car Wash Service Ltd* [1966] 1 WLR 745 at p 751; [1966] 1 All ER 242 at pp 246, 247, when he said: 'The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed.

[58] Gopal Sri Ram, JCA in *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Other* [2008] MLJU 418:

In arriving at his conclusions of fact a judge hearing a petition under section 181 of the Act must not consider events in isolation but as part of a consecutive story. In *Re HR Harmer Ltd* [1959] 1 WLR 62 Jenkins LJ approved the following approach adopted by Roxburgh J, the trial judge in that case, when interpreting s. 210 of the UK Companies Act 1948:

> The word 'oppression' is a word in common use and understanding in the English language. But I would just observe in passing that it [s. 210] does not say 'who complains of acts of oppression'; it says 'that the affairs of the company are being conducted in a manner oppressive ...' In other words, I think it invites attention, not to events considered in isolation, but to events considered as part of a consecutive story; and it is because I take that view that I have not dealt (and do not propose to deal) with each of the items which I have enumerated one by one.
>
> Annuar J (later CJ (Malaya)) in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors* [1994] 2 MLJ 789 adopted the same approach and an appeal against his decision to the Supreme Court was dismissed. So too, the Federal Court in *Owen Sim v. Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113 approved of this approach.

[59] Applying the principles outlined above, I shall deal with the petition as follows:

Locked Out Of Management

[60] The petitioner is a minority shareholder holding 25% whilst the respondent holds 75%. The petitioner alleged that he was instrumental for the initial setting up, development, and profitability of the company. The petitioner said he was excluded for the management of the 3rd respondent and its subsidiaries. As a shareholder of the 3rd respondent, the petitioner contended that he had an implied right to participate actively in the management of the 3rd respondent and its subsidiaries. It is further contended by the petitioner that he was edged out of the affairs of the company and had been barred from entering the premises and denied any involvement or say in the management of the company.

[61] Based on the oral and the documentary evidence the Petitioner had an active role in the establishment and management of the trust business in Labuan. The petitioner had initially set up a law practice before he decided to set up a trust business sometime in 1991. He was introduced to the 2nd respondent sometime in 1991 by one of the salaried partner of DCM who was practicing in Johor Bahru. Obviously when they first met, the petitioner and the 2nd respondent immediately hit it off and subsequently both the petitioner and the 2nd respondent decided to become partners in the law firm, DCM.

[62] Both agreed to set up a branch office in Labuan and since the petitioner's former law firm was dissolved, it was only convenient and practical that the files, furniture and computers of the petitioner's dissolved firm were transferred to DCM Labuan. This was confirmed by PW7, Lee Li Ching, a former staff of Messers Johnson & George and DCM. She said in cross-examination that:

> ... the firm was in Labuan, ... Jalan Bunga Dahlia ... still in the same office.

[63] Therefore the respondents' contentions that DCM Labuan was not set up by the petitioner and that premises and assets of the petitioner's law firm was not transferred to DCM are clearly untrue.

[64] The petitioner said that from the time the company was set up he was actively involved in the running and management of the company. Documentary evidence shows that the petitioner had signed and approved vouchers as well as to approve the leave of the staff. He also determined and reviewed bonuses and salary increases of the staff in Labuan. PW5, Christine Lum Yuet Meng gave evidence confirming that in relation to the 3rd respondent, PTMB, PTnet (M) SB and PNSB, all vouchers and cheques was signed by the petitioners.

[65] PW5 Ng Paik Thoe (PW2) who was the company secretary of the 3rd respondent from 1996-2000 said in evidence that the petitioner also approved the capital expenditure.

[66] Documentary and oral evidence also show that the petitioner approved and signed off the audited accounts of 1995-2004. He had also signed the audited accounts for PTnet (M) SB and PNSB as well as for PTNLL.

[67] When the petitioner could not go to the Labuan's office, PW8 and PW9 arranged for the documents to be sent to Kuala Lumpur for the petitioner to sign.

[68] The petitioner continued to sign and approved the audited accounts even after the dissolution of DCM and the acquisition of Trust Net Ltd by the 2nd respondent. This continued until 2006 even after Kim Boo was made a director in July 2005.

[69] Who is Kim Boo? Unfortunately she was not called as witness by the petitioner nor the respondent to explain her role in the company in particular as the Mentor Director. Kim Boo seemed to be the right hand person of the 2nd respondent. She was the 2nd respondent's nominee director. However from the evidence tendered she did not play any managerial role in the 3rd respondent except that she was the Mentor Director for the staff of the 3rd respondent.

[70] The petitioner from the evidence adduced, visited the office in Labuan regularly at least once a month. The 2nd respondent was and still is mainly based in Singapore and rarely visited the office in Labuan. It is highly probable, based on the evidence that there was an arrangement between the petitioner and the 2nd respondent for the petitioner to manage and run the Labuan office as it would have been more convenient and practical.

[71] PW5, and PW8 Agnes Ong told the court that they see Foo Chee Thong (PW9) as the person in charge of the office and the trust business in Labuan. However this is contrary to the documentary evidence as well as the oral evidence which show that the petitioner was the person running the Labuan office, whilst Foo was assisting him.

[72] Everything was running well and the company in Labuan was flourishing as well as the company in Singapore until 2005/2006 when there was a dispute between the petitioner and the 2nd respondent as to the shareholding in Portcullis Holdings (Malaysia) Sdn Bhd. The dispute revolved around the interpretation of the provisions of the Memorandum of Agreement which was executed between the parties in 1997. The Memorandum of Agreement was entered into for the purpose of carrying into effect the merger of two law firms DCM and Syed Alwi Teoh and Ng (SANT). Salient features of the agreement:

(i) For a period of five years from the effective date, the 2nd respondent was the managing partner and has the right to veto all and any decisions of the partnership (cl. 5);

(ii) Three years from the effective date the 2nd respondent has the right to require any one of the partners to retire from the partnership (cl. 6.3); and

(iii) The entire capitals of Portcullis Trust Sdn Bhd and Portcullis Nominees Sdn Bhd are wholly beneficially owned by the 2nd Respondent, the petitioner and another partner Eugene Lai (cl. 10).

[73] When did the oppression begin? Based on the documentary as well as oral evidence, certain events took place which culminated into the oppression:

(i) When Kim Boo was appointed the director and was appointed as the Mentor director. The staff came directly under her. No board resolution was made or any consultation with the petitioner as to Kim Boo's role in the company.

(ii) The new organization chart removed the petitioner from the management of the 3rd respondent and its subsidiaries. The staff of the 3rd respondent was to no longer report to the petitioner but to Kim Boo who by the reorganization is now the Mentor Director.

(iii) The management of the 3rd respondent is to be by PW5 and PW9 is to manage PTNLL.

(iv) The power to approve claims was removed from the petitioner.

(v) PW5 and PW9 ceased communication with the petitioner even though they have been working for or with him since the inception of the company.

(vi) Transfer of funds from the 3rd respondent to ITCHL. The transfer of funds was ratified in a board meeting in Batam.

[74] The respondents submitted that the petitioner did not come to court with clean hands and did not make a full and frank disclosure of the material facts and he had accepted at the outset that he is a minority shareholder with no power to make any major decisions. Therefore there is no issue of oppression taking place. It is contended that the petition should be dismissed as it is made against a subsidiary of the 3rd respondent, PTNLL in particular, the complaints with regards to the transfer of funds and the failure to declare dividends. PTNLL is a company incorporated under the Labuan Trust Company Act since the 3rd respondent is a company incorporated in Labuan.

[75] The aforesaid Act has been repealed by the Labuan Financial Services and Securities Act 2010.

[76] The petitioner argued that although the alleged oppressive conducts involved a 'Labuan Company', the Petition is against the 3rd respondent, a parent company of PTNLL. Therefore since it is a company incorporated under the Companies Act, s. 181 of the Companies Act is applicable.

[77] No evidence was tendered to show that PTNLL was incorporated under the Labuan Companies Act 1990 for it to fall within the definition of a Labuan company. Evidence was given that PTSB was given a license to operate the trust business in Labuan in 1995.

[78] Section 59 of the aforesaid, defined "trust company business" as:

(a) establishing or using a share transfer office or share registration office;

(b) administering, managing or otherwise dealing with property as an agent, legal personal representative or trustee, whether by servant or agent or otherwise;

(c) maintaining an agent for the purpose of soliciting or procuring business, whether or not the agent is continuously resident in Labuan;

(d) maintaining an office, agency or branch, whether or not that office, agency or branch is also used for any purpose by another entity;

(e) the provision of:

(i) management and accounting services to; or

(ii) directors, secretaries and registered offices for, Labuan companies incorporated or registered under the Labuan Companies Act 1990 and foreign Labuan companies registered under that Act;

(f) incorporating or registering companies under the Labuan Companies Act 1990 and generally acting as a lodging agent for any document required to be lodged by a company or person under that Act; and

(g) providing such other services as may be approved by the Authority from time to time, to or on behalf or any person.

[79] Section 152. Labuan Companies Act 1990 Non-application of specified written laws:

(1A) Except as otherwise expressly provided in this Act, the provisions of the Companies Act 1965 shall not apply to a Labuan company or a foreign Labuan company incorporated or registered under this Act Section 184.

Labuan Financial Services And Securities Act 2010 Application of Labuan Companies Act 1990 and Companies Act 1965,

(1) In addition to, and not in derogation of, the provisions of this Act:

(a) the Labuan Companies Act 1990 shall apply to:

(i) a bank licensee that is not a Malaysian bank licensee; and

(ii) an insurance licensee that is a Labuan company or a foreign Labuan company; and

(b) the Companies Act 1965 shall apply to:

(i) a Malaysian bank licensee or a licensed entity licensed under section 90 which is an office of a Malaysian bank established under that Act; and

(ii) an insurance licensee which is a branch of a Malaysian insurer.

(2) Where there is any conflict or inconsistency between the provisions of this Act and the other Acts referred to in subsection (1) in their application to the respective licensed entities, the provisions of this Act shall prevail.

(3) Where any difficulty or doubt arises in the application of subsection (1) in relation to any particular licensed entity or any particular matter or circumstance or in general, the Authority may resolve the same by issuing a direction on the issue.

[80] The documentary evidence show that the 3rd respondent was incorporated to hold the shares in PT(L) SB and PNSB and therefore s. 181 of the Companies Act is applicable in this case.

[81] Selventhiranathan J *Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors* [1998] 3 CLJ (Supp) 126:

A The grievances of the minority shareholders looked at in totality amounted to oppressive, discriminatory and prejudicial conduct by the majority shareholders. There was no doubt that the minority shareholders were excluded from the day to day administration of the company. In this respect, oppression would be found where a
B shareholder who was entitled to manage the company was excluded from the scope of management.

[82] Similarly in this instant petition, based on the oral and documentary evidence the petitioner has been excluded from the day to day management of the company which he had managed
C since its inception. No notice was given to the petitioner.

Affairs Of The Company Under s. 181 Of The Companies Act

D **[83]** The learned counsel for the petitioner submitted that the 'affairs of the company' under s. 181 should also include activities concerning subsidiary.

[84] Low Hop Bing J in *Koh Jui Hiong & Ors v. Ki Tak Sang & Ors* [2009] 10 CLJ 205 at p. 216 said this:

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> Although our Companies Act 1965 does not define the expression "affairs of the company", I am inspired by the position in Australia where this expression is defined in s. 53 of the Australian Corporation Law to include, *inter alia*, matters relating to trading activities, and profits and loss, its internal management
> F and proceedings, voting rights, or "securities" in and made available by the company. In *Re Cumberland Holdings Ltd* [1976] 1 ACLR 361, Bowen CJ construed this expression widely, as it is not limited to business or trade matters but encompasses all matters which may come before the board for consideration: pp.
> G 374-375.
>
> Illustrations of this expression are:
>
> (i) The conduct of a director removing all the furniture, equipment and the company's books and records from the
> H office where the company carried out its business: *Re East West Promotions Pty Ltd* [1986] 4 ACLC 84;
>
> (ii) Failure to pay money due to a subsidiary: *Nicholas v. Soundcraft Electronics Ltd & Anor* [1993] BCLC 360; and
>
> I (iii) Where a person who is nominated by a joint venture company to act as a director of another company acts in a manner which is detrimental to the joint venture company:

Kumagai Gumi Co Ltd v. Zenecon Pte Ltd & Ors and Other Appeals [1995] 2 SLR 297; and *Re Kenari Resorts Pte Ltd* [1995] 3 SLR 685.

[85] In Chan & Koh on *Malaysian Company Law (Principles and Practice)* (2nd edition) the author said that with regard to whether the affairs of a related company can be construed as the affairs of the company which is the subject of an oppression petition, the mere fact that a parent company fails to pay a debt due to its subsidiary does not amount to an act in the business of its subsidiary. However the affairs of related companies in a corporate group can be included in the affairs of other group companies. *Re Dernacourt Investment Pty Ltd; Baker Davis Supply Co Pty Ltd & Ors Dernacourt Investments Pty Ltd & Ors v. Dernacourt Investments Pty Ltd & Ors* [1990] 2 ACSR 553:

> where justice and commonsense so require, the separate legal identities of various companies within a group and look instead at the economic entity of the whole group.

[86] It is only reasonable to look at the activities of the ultimate holding company and the subsidiary as the activities are inter twined and related.

[87] The rule in *Foss v. Harbottle* [1843] 2 Have 461 has laid down a well known principle which has resulted from the refusal of the court to interfere in the management of a company at the instance of a minority of its members who are dissatisfied with the conduct of the company affairs by the majority or by the board of directors. The court, under the pretext of minority protection under s. 181 should be slow from interfering or enquiring into the desirability or wisdom of the acts of those who control or manage the company's affairs. It cannot be the function of the court to take management decisions and to substitute its opinions for those of the directors and the majority of the members. If the thing complained of is a thing which in substance the majority of the company are entitled to do in accordance with the relevant rules and regulations, then it is only prudent that a meeting of the members be called and ultimately let the majority get their wishes. The justification for the rule is the need to preserve the right of the majority to decide how the company's affairs shall be conducted (see: *Lord v. Copper Mines Co* [1848] 2 Ph 740 at 751 and *Harben v. Phillips* [1883] 23 Ch D 14 at 39 - per Cotton LJ).

[88] I therefore accept the petitioner's version as the reasonable, credible and probable version, on the ground that it is cogently supported by documentary evidence. The evidence adduced for the respondents are self-destructive and clearly contradicts their own contemporaneous documents. It is further observed during the hearing of the petitioner, the respondent held a board meeting to ratify actions in relation to the agreements entered. The board meeting was held without notice or presence of the petitioner. By reason of the matters stated above, the conduct of the 1st and 2nd respondents in a purported exercise of powers of the company for a collateral purpose is consequently oppressive, unfairly prejudices and in disregard of the interests of the petitioner.

[89] Therefore I make the following order:

(1) (i) that the 1st respondent and/or the 2nd respondent is in breach of the shareholders' agreement for the petitioner to manage Portcullis Holdings (Malaysia) Sdn. Bhd. (hereinafter referred to as "the company" and its subsidiaries namely Portcullis Nominees (Malaysia) Sdn Bhd, Portcullis Trust (Malaysia) Berhad, Portcullis TrustNet (Malaysia) Sdn Bhd., and Portcullis TrustNet (Labuan) Limited (hereinafter collectively referred to as "subsidiaries");

(ii) that the respondents and/or any one of the them acting jointly and/or separately are conducting the affairs of the company and its subsidiaries, and/or are exercising the powers as directors of the company and its subsidiaries, in a manner that is oppressive and/or in disregard of the petitioner's interest as a member of the company;

(iii) that the respondents have procured and/or caused to be done acts which unfairly discriminates against or is otherwise prejudicial to the petitioner as a member of the company;

(iv) that the removal of the petitioner from management of the company and its subsidiaries is unlawful;

(v) that the act of 2nd respondent in instructing Foo Chee Thong, to transfer USD500,000 from the accounts of Portcullis TrustNet (Labuan) Limited ("PTnet(L)L") in

Maybank International (L) Ltd and HSBC Bank Malaysia Berhad, Labuan branch to International Trustee Holding Company Limited ("ITHCL") account in DBS Bank Ltd Singapore is unlawful;

(vi) that the act of the 2nd respondent in causing surplus funds available in PTnet(L)L, that is totalling USD$797,855 and available for distribution by way of dividends through PTnet(L)L and the company were transferred to companies outside Malaysian jurisdiction and controlled by the 2nd respondent, such as ITHCL, Portcullis Trustnet (Singapore) Pte Ltd, Portculis Fund Services (S) Pte Ltd and Portcullis (China) Ltd, without obtaining the approval and consent of the board of directors of PTnet(L)L and/or the petitioner is unlawful; and

(vii) that the 2nd respondent had wrongfully caused the following sums to be transferred or withdrawn from PTnet(L)L to ITHCL:

(a) USD$420,000 to be transferred from PTnet(L)L to ITHCL; and

(b) USD$241,742.68, being debts collected by ITHCL for PTnet(L)L from PTnet (L)L's clients, to be retained by ITHCL.

The following injunctions:

(2) (i) an injunction restraining the 2nd respondent whether by himself, agent and/or servants from carrying out or giving effect to the transfer of USD$500,000 from the accounts of PTnet(L)L in Maybank International (L) Ltd and HSBC Bank Malaysia Berhad, Labuan branch to ITHCL's account in DBS Bank Ltd in Singapore and in the event that the transfer had been effected, for an order that the 2nd respondent do return the said sum or any part thereof to PTnet(L)L within seven days from the date of this order; and

(ii) an injunction restraining the 2nd respondent whether by himself, agent and/or servants from carrying out or giving effect to the transfers of any of the company and its subsidiaries' funds in the course of ordinary business to

A any other party without prior consent from the petitioner as director and member of the company, which consent should not be unreasonably witheld.

(3) An order that the 1st respondent do sell to the petitioner all
B the 1st respondent's shares in the company at the net book value within 90 days from the date of the order.

(4) An order that the 2nd respondent and the company do hereby cause all assets, monies and/or properties which have been transferred or withdrawn from the company and the
C subsidiaries to any third party, including but not limited to all monies transferred or withdrawn from PTnet(L)L to ITHCL as stated in paras 5.4.15 and 5.4.16 of the amended petition dated 12 March 2010, to be forthwith refunded to the company and the subsidiaries.
D

(5) An order that the respondents or any one of them are forthwith restrained from effecting and/or carrying out any transactions and/or arrangements in any manner howsoever for the purpose of and/or relating to the transfer and/or
E withdrawal of any assets, monies and/or properties which the company and the subsidiaries have beneficial and/or legal interest to any third party without prior consent from the petitioner as director and member of the company, which consent shall not be unreasonably withheld.
F

(6) An order that all arrangements, agreements and/or contracts entered into and all resolutions passed in connection with and/or for the purpose of effecting the transfer and/or withdrawal of any assets, monies and/or properties which the company
G and the subsidiaries have beneficial and/or legal interest to any third party, including but not limited to all monies transferred or withdrawn from PTnet(L)L to ITHCL as stated in paras. 5.4.15 and 5.4.16 of the amended petition dated 12 March 2010, to be forthwith set aside and shall have no effect in any
H manner howsoever.

(7) An order that the 1st and 2nd respondents shall:

(i) refund all unauthorized and/or improper advances which the 1st and 2nd respondents received with effect from
I 7 July 2006 till the date of judgment to the company;

(ii) give a full account and disclosure of the financial transactions by the company from 7 July 2006 till the date of judgment;

(iii) give a full account and disclosure of the profits made by the company and the subsidiaries from 7 July 2006 till the date of judgment; and

(iv) give a full account of all monies paid out of the company and the subsidiaries without resolution of the Board of Directors of the company and the subsidiaries.

(8) Parties are at liberty to apply.

(9) The cost of RM100,000 to be paid forthwith by the respondents to the petitioner.